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United States v. Winstar: Renewed Government Liability Arising from the Savings and Loan Crisis

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***United States v. Winstar*: Renewed Government Liability Arising from the Savings and Loan Crisis?**

I. INTRODUCTION

The federal government stands in a unique position when it enters into a contract. The government enjoys this unique position because it possesses the power to create laws that will affect contracts to which it is a party.¹ In some instances, the government may pass a law that renders the government's contractual obligations illegal, or impossible to perform.² When a change in a law renders a contract between two private parties impossible to perform, the legal doctrine of impossibility discharges those private parties from their obligation to perform the contract.³ The law releases private parties from liability for breach in this situation because those parties have no control over the change in law or the resulting breach.⁴ Obviously, this rationale for releasing private parties from liability when a change in law renders their contract impossible to perform does not apply when the government is a party to a contract. The government, unlike a private party, does possess control over changes in the law.⁵ In *United States v. Winstar Corp.*,⁶ the United States Supreme Court explored the government's unique position as a party to a contract. More specifically, the Court examined the government's liability to private parties when a change in the law alters the government's contractual obligations.⁷ In doing so, the Court balanced the government's need to honor its contractual obligations against the public's interest in new legislation.⁸

1. See K. McKay Worthington, Note, *Is Your Government Contract Worth the Paper It's Written On? An Examination of Winstar v. United States*, 1996 COLUM. BUS. L. REV. 119, 119 (1996).

2. The government has been permitted to pass laws that discharge itself from unfavorable contracts without any penalty for breach of contract because of its need to safeguard the public welfare. See *id.* at 124.

3. See E. ALLAN FARNSWORTH, CONTRACTS § 9.5, at 701 (2d ed. 1990); see also Worthington, *supra* note 1, at 119.

4. See FARNSWORTH, *supra* note 3, at 701.

5. See Worthington, *supra* note 1, at 124.

6. 116 S. Ct. 2432 (1996).

7. See *id.* at 2439.

8. See *id.* at 2438.

In *Winstar*, the Court considered whether the government was liable for damages resulting from breach of contract.⁹ Glendale Federal Bank, FSB (Glendale), the Winstar Corporation (Winstar), and the Statesman Group, Inc. (Statesman) claimed that the government contracted to allow them special regulatory treatment for supervisory goodwill,¹⁰ but the government subsequently discharged itself from the contract by passing new regulations.¹¹ The government asserted two defenses denying liability for any damages related to the breach of contract claims. First, the government argued that the unmistakability doctrine blocked its liability.¹² Under this doctrine, the government is not liable for breach when new legislation modifies a contract unless at the time the government entered into the contract it surrendered the right to enact such future legislation¹³ in unmistakable terms.¹⁴ Second, the government argued that the sovereign acts doctrine blocked its liability for breach of contract. Under this defense, the government cannot be held liable for passing legislation designed to protect the public welfare.¹⁵ A plurality of the United States Supreme Court rejected both defenses and concluded that the government was liable for its breach of contract.¹⁶

This Note first discusses the facts¹⁷ and procedural history¹⁸ of *Winstar*. It then reviews the background of the government's two primary defenses: the unmistakability and sovereign acts doctrines.¹⁹ Following an examination of these two doctrines, this Note analyzes the *Winstar* Court's treatment of these defenses and analyzes the issues that affect the plurality's decision.²⁰ Finally, this Note considers the precedential effect of *Winstar*, not only to the other thrifts that were similarly affected by the government's decision to discharge itself from its contractual obligations, but also to the government's

9. *See id.* at 2437.

10. *See infra* notes 33-38 and accompanying text.

11. *See id.* at 2440.

12. *See id.* at 2437.

13. Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989, which made enormous changes to the structure of federal thrift regulation. *See id.* at 2446.

14. *See id.* at 2448.

15. *See id.*

16. *See id.* at 2440.

17. *See infra* notes 22-77 and accompanying text.

18. *See infra* notes 78-91 and accompanying text.

19. *See infra* notes 92-119 and accompanying text.

20. *See infra* notes 120-68 and accompanying text.

scope of liability in general.²¹

II. STATEMENT OF THE CASE

Since its first crisis during the Great Depression,²² the savings and loan, or "thrift," industry has become "one of the longest regulated and most closely supervised" industries in the nation.²³ The regulatory regime passed by Congress to stabilize the industry²⁴ worked reasonably well while inflation was low, the economy remained healthy, and the nation continued to grow.²⁵ However, the thrift industry entered its second crisis in the late 1970s and early 1980s as high inflation and high market interest rates caused the interest rates that thrifts paid to depositors to exceed the interest rates that thrifts received from their mortgages.²⁶ As a result of the disparity between interest revenues and interest paid to depositors, thrifts failed at alarming rates.²⁷

In the early 1980s, at a time when one-third of the nation's thrifts were insolvent or financially troubled,²⁸ the Federal Savings and Loan Insurance Corporation (FSLIC) did not have sufficient funds to close all the institutions deemed insolvent.²⁹ As an alternative to depleting

21. See *infra* notes 169-75 and accompanying text.

22. See *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2440 (1996) (noting that, in the first thrift crisis during the Great Depression, forty percent of the nation's home mortgages went into default, approximately 12,000 thrift institutions failed, and depositors in the failed thrifts lost \$200 million).

23. *Id.* (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)).

24. Three statutes were passed during the crisis to stabilize the industry. See *id.* The Federal Home Loan Bank Act created the Federal Home Loan Bank Board (Bank Board). See *id.* (citing Ch. 522, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988 ed.))). The Home Owner's Loan Act of 1933 authorized the Bank Board to charter and regulate federal thrifts. See *id.* (citing Ch. 64, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1988 ed.))). The National Housing Act created the Federal Savings and Loan Insurance Corporation (FSLIC), under the Bank Board's authority, to insure thrift deposits and regulate all federally insured thrifts. See *id.* (citing Ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988 ed.))).

25. See *id.*

26. See *id.* The thrifts entered into long-term, fixed rate mortgages during periods of low market interest rates. See *id.* In order to attract depositors, the thrifts had to pay interest rates that exceeded the rates of their long-term mortgages. Worthington, *supra* note 1, at 121.

27. Worthington, *supra* note 1, at 121. As a result, 435 thrifts failed between 1981 and 1983. *Winstar*, 116 S. Ct. at 2440. The failure of the 435 thrifts amounted to the failure of one out of every seven thrifts. See Worthington, *supra* note 1, at 120 n.6.

28. See JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 35 (1992).

29. See *Winstar*, 116 S. Ct. at 2441. Already failed savings and loans threatened to

the limited insurance funds of the FSLIC, the Federal Home Loan Bank Board (Bank Board) encouraged healthy thrifts to acquire the failing thrifts in a series of "supervisory mergers."³⁰ The regulators hoped that the healthy thrifts would be able to revive the failed thrifts while simultaneously relieving the FSLIC of its responsibility to reimburse depositors' funds.³¹ To make the thrift industry a more attractive business opportunity, the Bank Board and the FSLIC deregulated the industry and weakened the requirement that thrifts maintain adequate capital reserves as a cushion against losses.³²

The Bank Board developed new "regulatory accounting principles" (RAP) which replaced generally accepted accounting principles (GAAP) for the purposes of determining compliance with regulatory capital requirements.³³ Critically, the RAP permitted the acquiring thrifts to use the excess purchase price over the fair value of all identifiable assets³⁴ as an intangible asset called either "goodwill" or "supervisory goodwill."³⁵ The new RAP, which were later character-

exhaust the regulator's insurance funds. *See id.* Total reserves declined from approximately \$6.5 billion in 1980 to \$4.6 billion in 1985, while the Bank Board estimated that it would take approximately another \$16 billion to close all thrifts deemed insolvent under generally accepted accounting principles (GAAP). *See id.* By 1988, the FSLIC was insolvent by over \$50 billion. *See id.*

30. *See id.* at 2442; *see also* Michael W. Clancy, 1995 Year in Review: The Federal Circuit's Government Contracts Decisions, 25 PUB. CONT. L.J. 537, 588 (1996).

31. *See* Worthington, *supra* note 1, at 121.

32. *See* *Winstar*, 116 S. Ct. at 2441. Regulatory capital requirements are the percentage of depositor funds that thrifts need to retain. *See* MACEY & MILLER, *supra* note 28, at 284. The capital requirements are set up to protect depositors and the deposit insurance fund. *See* *Winstar*, 116 S. Ct. at 2445. Capital requirements are a cushion against insolvency. *See* MACEY & MILLER, *supra* note 28, at 284. Capital adequacy regulation requires thrifts to maintain sufficient capital against their assets. *See id.*

33. *See* *Winstar*, 116 S. Ct. at 2441. The Financial Accounting Standards Board adopted the regulatory accounting principles for the acquisition of failing savings and loans associations in Financial Accounting Standards No. 72. *See id.* at 2445.

34. In a free market, a purchaser "would not pay a price for a business in excess of the value of that business' assets unless there actually were some intangible 'going concern' value that made up the difference." *Id.* at 2442 (citing M. LOWY, HIGH ROLLERS: INSIDE THE SAVINGS AND LOAN DEBACLE 30 n.5 (1991)).

35. *Id.* at 2442-43. "Goodwill" is an asset only on a business's balance sheet. *See id.* at 2445. Goodwill is valueless when a thrift fails because it is not cash, and cannot be used to pay off creditors. *See id.* The use of goodwill to satisfy capital requirements meant there was less real capital being used to satisfy capital requirements. Therefore, with the FSLIC lacking the funds necessary to pay off the creditors, taxpayers will need to pick up the tab if a thrift fails. *See id.* However, goodwill was necessary because the mergers hinged on the acquiring institutions using the resulting supervisory goodwill for capital adequacy purposes. *See* Philip Meyer, *Supreme Court is Extremely Active on Banking Issues*, 15 BANKING POL'Y REP. No. 3, at 2, 4 (1996). In most cases, the resulting or merged thrift would have immediately been insolvent under the federal standards had supervisory goodwill not counted toward the regulatory capital requirements. *See* *Win-*

ized by Congress as “accounting gimmicks,” were significant departures from GAAP.³⁶ The gimmicks instituted by RAP reduced capital requirements and hid the worsening financial condition of the industry.³⁷ The RAP enabled many weak institutions to merge with healthier institutions. These mergers allowed the weak institutions to continue operating.³⁸

Winstar involved three “supervisory mergers” in which the government induced investors to acquire failed or failing thrifts.³⁹ In each merger, the FSLIC and the Bank Board entered express contracts with investors.⁴⁰ The contracts permitted the investors to use supervisory goodwill to meet the regulatory capital requirements for the newly merged thrifts.⁴¹ By allowing the newly merged thrifts to rely upon supervisory goodwill to satisfy their capital requirements,⁴² the mergers saved millions of dollars for the government.⁴³

In September 1981, the first “supervisory merger” at issue in *Winstar* was born. Glendale, a profitable and well capitalized thrift, was approached by the Bank Board about a possible merger with First Federal Savings and Loan Association of Broward County, which had a negative net worth of over \$734 million.⁴⁴ The Bank

star, 116 S. Ct. at 2443. In addition, as permitted by GAAP, the thrifts were allowed to amortize the supervisory goodwill over periods as long as forty years. *See id.* Since supervisory goodwill did not exist forever, the thrifts needed to amortize or reduce its worth periodically. *See id.* In addition, goodwill has sometimes been described as negative net worth since liabilities exceed assets. Under the basic principle that assets equal liabilities plus net worth, with liabilities being greater than assets, the net worth would result in a negative amount.

36. *Winstar Corp. v. U.S.*, 994 F.2d 797, 802 (Fed. Cir. 1993), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996).

37. Thrifts that should have failed were allowed to survive even though the thrifts were not required to maintain adequate capital reserves as cushions against losses. *See Winstar*, 116 S. Ct. at 2441.

38. *See id.*

39. The Court of Federal Claims consolidated the cases of *Winstar Corporation*, *Glendale Federal Bank*, and *Statesman Bank and Savings* into *United States v. Winstar Corporation, et al.* *See id.* at 2447. In order to preserve the remaining funds of the FSLIC, the FSLIC solicited investors to acquire the troubled thrift. *See id.* at 2450.

40. *See Clancy, supra* note 30, at 588.

41. *See id.* The FSLIC developed lists of perspective acquirers, made presentations, held seminars, and generally tried to promote the acquisitions of these insolvent thrifts. *See Winstar*, 116 S. Ct. at 2442 n.3.

42. If the thrifts failed to meet regulatory capital requirements, the thrifts will be subject to penalties imposed by the regulators. *See id.* at 2449.

43. *See Clancy, supra* note 30, at 588. The government estimated that the Glendale merger alone saved the government approximately “three quarters of a billion dollars.” *Id.* at 588-89.

44. *See Winstar*, 116 S. Ct. at 2448. Glendale estimated that the Bank Board needed approximately \$1.8 billion to liquidate the failed thrift and only approximately \$1 billion

Board agreed to allow Glendale to amortize approximately \$716 million as supervisory goodwill over a forty year period and an additional \$18 million as supervisory goodwill over twelve years.⁴⁵ If the bank board had not permitted Glendale to use supervisory goodwill to satisfy its regulatory capital requirement, the merger would not have been possible because the newly created thrift would not have met the regulatory capital requirements.⁴⁶

In 1984, the second "supervisory merger" at issue in *Winstar* arose. In this merger, the FSLIC solicited bids for the acquisition of Windom Federal Savings and Loan Association (Windom), a thrift in danger of failing.⁴⁷ A group of private investors, with a capital contribution of \$2.8 million, formed Winstar to acquire Windom.⁴⁸ In addition to a \$5.6 million contribution from the FSLIC, the new Winstar corporation was allowed to amortize the supervisory goodwill that resulted from the merger for a period not to exceed thirty-five years.⁴⁹ As with the new thrift formed in Glendale, the new Winstar thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation if the supervisory goodwill had not been permitted to satisfy part of the thrift's regulatory capital requirements.⁵⁰

Finally in 1988, the third "supervisory merger" under scrutiny in *Winstar* evolved. Statesman approached the FSLIC about acquiring an insolvent thrift.⁵¹ The FSLIC ultimately persuaded Statesman to acquire an additional three failing thrifts in exchange for government assistance with the acquisition of all four thrifts.⁵² In acquiring all four thrifts, Statesman agreed to make a capital contribution of \$21 million, and the FSLIC contributed an additional \$60 million in cash.⁵³ In addition, Statesman was allowed to use approximately \$700 million of supervisory goodwill generated by the merger as capital to meet its regulatory capital requirements.⁵⁴ Statesman was also al-

was recoverable through the sale of the failed thrift's assets. *See id.*

45. *See Winstar v. U.S.*, 994 F.2d 797, 804 (Fed. Cir. 1993), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996).

46. *See Winstar*, 116 S. Ct. at 2449.

47. *See id.* at 2450. If Windom was allowed to fail, the estimated liquidation cost for the FSLIC was approximately \$12 million. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.* at 2450-51.

53. *See id.* at 2451.

54. *See Winstar v. U.S.*, 994 F.2d 797, 804 (Fed. Cir. 1993), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996).

lowed to treat \$26 million of the FSLIC's \$60 million contribution as permanent capital credit to the new thrift's regulatory capital.⁵⁵ As with Glendale and Winstar, Statesman would have immediately failed to meet regulatory capital requirements had the government not agreed to permit both supervisory goodwill and capital credit to be used as part of Statesman's regulatory capital requirements.⁵⁶

However, despite the potential success of these supervisory mergers, thrifts continued to fail⁵⁷ and Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)⁵⁸ to replace the FSLIC and the Bank Board with the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC).⁵⁹ The FIRREA required the OTS to "prescribe and maintain uniformly applicable capital standards for savings associations."⁶⁰ The most relevant aspect of the FIRREA to the three thrifts in the *Winstar* case was the OTS's requirement to limit the intangible assets that the FSLIC and Bank Board permitted thrifts to include as regulatory capital.⁶¹ The FIRREA replaced RAP with three new regulatory capital requirements that each thrift needed to meet.⁶² First, in the calculation of "core" capital,⁶³ supervisory good-

55. See *Winstar*, 116 S. Ct. at 2451. A permanent capital credit resulted when the FSLIC contributed cash to a merger and subsequently permitted the thrift to count the FSLIC's contribution as a permanent credit to the thrift's regulatory capital requirement. See *id.* at 2444. Because the thrift also counted the cash received toward its capital requirement, the thrift was able to double count FSLIC's cash contribution toward its regulatory capital requirements. See *id.*

56. See *Winstar*, 994 F.2d at 804.

57. See Clancy, *supra* note 30, at 589; see also *Winstar*, 116 S. Ct. at 2446.

58. 12 U.S.C. § 1464(t)(1)-(3), (9) (1994).

59. With the FSLIC \$56 million in the red and consumers fearing the instability of the thrift industry, Congress felt compelled by the "precarious financial condition" of the thrift industry to introduce sweeping legislative reform. See *Winstar*, 994 F.2d at 804 (citing H.R. Rep. No. 54(I), 101 Cong., 1st Sess. 292, 302 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 98). However, the regulatory response to the crisis in the thrift industry "actually aggravated the decline." See *Transohio Savings Bank v. Director, Off. of Thrift Supervision*, 967 F.2d 598, 602 (D.C. Cir. 1993).

60. *Winstar Corp. v. United States*, 64 F.3d 1531, 1538 (Fed. Cir. 1995) (en banc) (interpreting 12 U.S.C. § 1464(t)), *aff'd*, 116 S. Ct. 2432 (1996).

61. See *Winstar*, 994 F.2d at 804. The government preferred tangible assets because losses are absorbed by institutional owners, while with intangible assets, such as supervisory goodwill, losses are essentially borne by the taxpayers. See *id.* at 801. At the time, supervisory goodwill accounted for \$18 billion in regulatory capital. See *id.* at 805 (citing H.R. Rep. No. 54(I), 101 Cong., 1st Sess. 292, 497 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 293).

62. See Worthington, *supra* note 1, 123; see also *Winstar* 64 F.3d at 1538.

63. "Core" capital is defined as "core capital as defined by the Comptroller of the Currency for national banks, less any identifiable assets, plus any purchased mortgage servicing rights excluded from the Comptroller's definition of capital." Worthington,

will was strictly limited. Moreover, the amount of supervisory goodwill permitted was to decrease each year and was to be entirely eliminated from the calculation of core capital by December 31, 1994.⁶⁴ Next, supervisory goodwill was not permitted to be counted at all in determining "tangible" capital, which is defined as core capital minus any intangible assets.⁶⁵ Finally, supervisory goodwill was permitted to be counted as part of "risk-based" capital,⁶⁶ but the amortization of the goodwill was limited to twenty years.⁶⁷

With the limit on the ability of thrifts to include supervisory goodwill as regulatory capital under the FIRREA, Winstar, Statesman, and Glendale soon failed to meet the new statutory capital requirements.⁶⁸ Because the three thrifts failed to meet these new requirements, they were all subject to immediate seizure by the government.⁶⁹ Federal regulators seized and liquidated Winstar and Statesman as a result of their noncompliance with the new regulatory capital requirements.⁷⁰ Although Glendale also did not meet the capital requirements, it avoided seizure.⁷¹ Because the three thrifts "believ[ed] that the Bank Board and [the] FSLIC had promised them that the supervisory goodwill created in their merger transactions could be counted toward regulatory capital requirements, [the three thrifts] each filed suit against the United States . . . seeking monetary damages on [breach of contract] theories."⁷²

The government asserted two defenses in response to the thrifts' suits.⁷³ First, the government asserted the unmistakability doctrine

supra note 1, at 123 n.24.

64. See *Winstar*, 64 F.3d at 1538; see also Worthington, *supra* note 1, at 123.

65. See *Winstar*, 64 F.3d at 1538; see also Worthington, *supra* note 1, at 123.

66. FIRREA provided that risk-based capital "may deviate from the risk based capital standards applicable to national banks to reflect interest rate risk and other risks." Worthington, *supra* note 1, at 123 n.26.

67. See *Winstar*, 64 F.3d at 1538; see also Worthington, *supra* note 1, at 123.

68. See *United States v. Winstar*, 116 S. Ct. 2432, 2447 (1996). FIRREA's new policies have caused over 500 savings and loans to fail to meet one or more of the three capital requirements. See William K. Black, *Ending Our Forebearer's Forebearances: FIRREA and Supervisory Goodwill*, 2 STAN. L. & POL'Y REV. 102, 107 (1990).

69. See *Winstar*, 116 S. Ct. at 2447.

70. See *id.*

71. Initially, Glendale was able to avoid seizure only through massive private capitalization. See *id.* at 2447.

72. *Id.* The three thrifts filed suit for breach of contract. See Clancy, *supra* note 30, at 589.

73. See *Winstar*, 116 S. Ct. at 2448. The Supreme Court decided that the government could assert two other defenses. See *id.* The other two defenses were the rule that an agent's authority to make such surrenders must be delegated in express terms, and the doctrine that a government may not contract to surrender certain reserved powers. See *id.* The other two defenses were rejected based on similar arguments for why the gov-

and claimed that before the government must legally surrender sovereign or legislative authority, such terms must appear in the contract in unmistakable terms.⁷⁴ By raising the unmistakability doctrine, the government contended that unless the government unmistakably agreed not to enact legislation or regulations that would change their contracts, the contracts were subject to subsequent statutory and regulatory changes.⁷⁵ Second, the government asserted the sovereign acts doctrine and claimed that a government's sovereign acts do not give rise to a claim for breach of contract.⁷⁶ By raising the sovereign acts doctrine, the government contended that its contractual obligations were relieved because the legislation was necessary to protect the public welfare.⁷⁷

Rejecting the government's defenses, the Court of Federal Claims granted the three thrifts summary judgment for breach of contract.⁷⁸ The court rejected the government claims "that the [g]overnment could not be held to a promise to refrain from exercising its regulatory authority in the future unless that promise was unmistakably clear in the contract, and that the [g]overnment's alteration of the capital reserve requirements in the FIRREA was a sovereign act that could not trigger contractual liability."⁷⁹

A divided panel of the Federal Circuit, in a 2-1 decision, reversed the Court of Federal Claims decision.⁸⁰ The panel reversed the lower court's decision because the risk of a subsequent change in the regulatory capital requirements was not allocated to the government in an unmistakably clear manner.⁸¹ Thus, the circuit court found that the thrift institution assumed the risk of subsequent changes in legislation.⁸² Furthermore, the Federal Circuit not only concluded that the FIRREA legislation fell within the sovereign acts doctrine and absolved the government from liability for breach of contract.⁸³ However, in a 9-2 decision, the full Federal Circuit, sitting

ernment's unmistakability did not apply. *See id.* at 2461.

74. *See id.*

75. *Winstar Corp. v. United States*, 64 F.3d 1531, 1539 (Fed. Cir. 1995) (en banc), *aff'd*, 116 S. Ct. 2432 (1996).

76. *See Winstar*, 116 S. Ct. at 2463.

77. *See Winstar*, 64 F.3d at 1545.

78. *See Winstar*, 116 S. Ct. at 2447.

79. *Id.*

80. *See id.* The Court of Federal Claims consolidated the three cases and certified its decision for interlocutory appeal. *See id.*

81. *See id.*

82. *See Winstar Corp. v. United States*, 994 F.2d 797, 797 (Fed. Cir. 1993)), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996).

83. *See id.*

en banc, reversed the divided panel of the circuit and affirmed the trial court's ruling on liability.⁸⁴

The full court, agreeing with the trial court, rejected the government's unmistakability argument by holding that the unmistakability doctrine had no application in a suit for money damages.⁸⁵ In addition, the full court rejected the government's sovereign acts defense because the FIRREA's new capital requirements "singled out supervisory goodwill for special treatment" and therefore could not be said to be a "public" and "general act" within the meaning of the doctrine.⁸⁶ Chief Judge Archer, writing for the majority, concluded that Winstar had negotiated a contract with the federal regulators that permitted the thrift to record supervisory goodwill as regulatory capital, and the government failed to perform its contractual obligation.⁸⁷

The Supreme Court granted certiorari to review the Federal Circuit court's decision.⁸⁸ Justice Souter announced the decision of the Court and delivered the plurality opinion.⁸⁹ Seven of the justices recognized that the government was liable for damages because it breached its contracts with the three thrifts.⁹⁰ The seven justices, in concluding that the government breached the contracts with the three thrifts, rejected the government's defenses of the unmistakability and the sovereign acts doctrines.⁹¹

84. See *Winstar*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *aff'd*, 116 S. Ct. 2432 (1996). Circuit Judge Rich, who voted in the divided panel to reverse the Court of Federal Claims decision, voted with the majority to affirm the Court of Federal Claims in the full court opinion.

85. See *Winstar*, 116 S. Ct. at 2447.

86. *Id.*

87. See Case Comment, *Contracts—Financial Institutions Reform, Recovery and Enforcement Act—Federal Circuit Holds Federal Government Liable for Breach of Thrift Contracts*, *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *cert. granted*, 116 S. Ct. 806 (1996), 109 HARV. L. REV. 1162, 1163-64 (1996). The dissent argued that the majority misapplied the sovereign acts doctrine. See *id.* at 1164. The dissent also argued that the government was acting in its role as a sovereign, and not as a contractor, when it passed FIRREA. See *id.* at 1165.

88. See *Winstar*, 116 S. Ct. at 2447.

89. Justices Stevens, Breyer, and O'Connor joined the opinion of Justice Souter. See *id.* at 2440. Justice Scalia, joined by Justices Kennedy and Thomas, filed an opinion concurring in judgment. See *id.* Chief Justice Rehnquist filed a dissenting opinion, in which Justice Ginsburg joined in most part. See *id.*

90. See *id.*

91. See *id.* at 2438.

III. BACKGROUND LAW

The unmistakability and the sovereign acts doctrines were created to place the government on equal footing with private parties.⁹² While the government should be free to address the public welfare through new legislation, the government should not be able to avoid compliance with costly, inconvenient or disadvantageous contractual obligations by outlawing its own performance under the contract.⁹³ Therefore, the judiciary has attempted to craft rules that leave the government in a position no better or worse than that of a private contractor.⁹⁴ To equalize the government's contracting powers with those of a private party, the courts utilize both the unmistakability and sovereign acts doctrines.

A. Unmistakability Doctrine

The unmistakability doctrine protects the government from unwillingly committing itself to withhold its legislative prerogative in the future.⁹⁵ The Supreme Court has held that the "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."⁹⁶ In *Jefferson Branch Bank v. Skelly*,⁹⁷ the Supreme Court held that the bank was free from taxation imposed by subsequent legislation because the contract right to be free from taxation was "expressed in terms too plain to be mistaken."⁹⁸ However, the Court declared in *Bowen v. Public Agencies Opposed to Social Security Entrapment*⁹⁹ that "contracts should be

92. See Worthington, *supra* note 1, at 127. Chief Justice Rehnquist suggested that the unmistakability and sovereign acts doctrines are not entirely separate principles. See *Winstar*, 116 S. Ct. at 2485 (Rehnquist, C.J., dissenting). For further discussion of the way in which the doctrines provide for equal footing, see *infra* notes 94-118 and accompanying text.

93. See Worthington, *supra* note 1, at 127.

94. *Id.* at 124-25.

95. See *id.* at 129.

96. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

97. 66 U.S. (1 Black) 436 (1861).

98. *Id.* at 446.

99. 477 U.S. 41 (1986). In *Bowen*, California brought suit challenging the constitutionality of an amendment to the Social Security Act preventing states from withdrawing from the old age, survivors and disability insurance benefits program if the states were participating on the effective date of the amendment. See *id.* The Supreme Court held Congress had the authority to amend the agreement. See *id.* The Court held no contract existed since the original Social Security Act reserved Congress the power to amend the act. See *id.* at 51-52.

construed, if possible, to avoid foreclosing exercise of sovereign authority.”¹⁰⁰ Therefore, unless specifically addressed in the contract, the government reserves its right to legislate, even if new legislation will impair its contracts with private parties.¹⁰¹

The government relied on the unmistakability doctrine in *Winstar* in part because of an unorthodox interpretation¹⁰² of the unmistakability doctrine in *Transohio Savings Bank v. Director, Office of Thrift Supervision*.¹⁰³ In *Transohio*, the D.C. Circuit interpreted the doctrine as requiring “one who wish[es] to obtain a contractual right against the sovereign that is immune from the effect of future changes in the law must make sure that the contract confers such a right in unmistakable terms.”¹⁰⁴ The D.C. Circuit held that because the contract did not specifically prohibit subsequent legislation, no breach occurred upon the passage of subsequent legislation.¹⁰⁵ However, the Federal Circuit in *Winstar* did not agree with the D.C. Circuit’s interpretation.¹⁰⁶ The Federal Circuit held that the government could be liable for breach of contract even if a contract did not specifically prohibit subsequent legislation.¹⁰⁷ The split between the circuits regarding the unmistakability doctrine set the stage for the Supreme Court’s analysis in *Winstar*.¹⁰⁸

B. Sovereign Acts Doctrine

Just as the unmistakability doctrine may serve as a defense for government parties charged with breach of contract, the sovereign acts doctrine stands for the proposition that the “United States as a contractor cannot be held liable directly or indirectly for public acts of the United States as a sovereign.”¹⁰⁹ The doctrine balances the government’s need for freedom to legislate with its obligation to honor contracts.¹¹⁰ In *Horowitz v. United States*,¹¹¹ the Supreme Court

100. *Id.* at 52-53.

101. *See* Worthington, *supra* note 1, at 131.

102. *See id.* at 132.

103. 967 F.2d 598 (D.C. Cir. 1992).

104. *Id.* at 618.

105. *See id.* at 614.

106. *See* Worthington, *supra* note 1, at 133.

107. *See id.*

108. *See id.*

109. *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl. 1967) (citing *Horowitz v. United States*, 267 U.S. 458 (1925)).

110. *See* *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2438 (1996).

111. 267 U.S. 458 (1925). *Horowitz* is the classic example of the sovereign acts doctrine. In *Horowitz*, the New York Ordinance Board was relieved of liability caused by a

acknowledged that under the sovereign acts doctrine, the government may act in two separate capacities: as a sovereign and as a contractor.¹¹² As a sovereign, the government is protected when it acts to protect the public's welfare.¹¹³ The government is immune from liability as long as its acts do not "*especially . . . alter, modify, obstruct or violate the particular contracts into which it enters with private persons.*"¹¹⁴

In *Winstar*, the government raised both of these doctrines as defenses. The Court, however, held that neither doctrine relieved the government of its liabilities.¹¹⁵ The four justices in the plurality concluded that neither of these doctrines applied to this case.¹¹⁶ Although the remaining five justices stated that both doctrines did apply in this case, the five justices were split regarding the effects of the doctrines.¹¹⁷ Justice Scalia, writing in concurrence, stated that the doctrines did not foreclose the thrifts' claims.¹¹⁸ Chief Justice Rehnquist, however, stated that these defenses relieved the government of its liabilities.¹¹⁹ Because of the disagreement among the Justices, the status of both doctrines to relieve the government of liability remains uncertain.

IV. SIGNIFICANCE OF THE CASE

In *Winstar*, Glendale, Winstar, and Statesman entered into contracts with the federal government that expressly allowed the use of

delay in delivering a shipment of silk because the government's decision to place an embargo on the shipment of silk was the result of the government's "public and general acts as a sovereign." *Id.* at 461.

112. See Worthington, *supra* note 1, at 127. As a sovereign, the government promotes the general welfare. See *id.* When acting as a contractor, the government makes enforceable promises to private parties. See *id.*

113. See *id.* The government argued that a sound regulatory capital requirement is fundamental in "promoting the safety and soundness of individual institutions and ultimately the stability of the [nation's] financial system." *Winstar Corp. v. United States*, 994 F.2d 797, 801 (Fed. Cir. 1993), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996).

114. *Horowitz*, 267 U.S. at 461 (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)) (emphasis added). The act provides the government protection from facing liability beyond which a private party would face due to changes in contract duties resulting from a change in law. See Worthington, *supra* note 1, at 127. However, the government is liable when it legislates with the specific purpose of changing the terms of one of its contracts. See *id.* at 127-28.

115. See *Winstar*, 116 S. Ct. at 2438-39.

116. See *id.* at 2438.

117. See *id.* at 2477 (Scalia, J., concurring in judgment). For further discussion, see *infra* notes 144-48 and accompanying text.

118. See *Winstar*, 116 S. Ct. at 2477 (Scalia, J., concurring in judgment).

119. See *id.* at 2485 (Rehnquist, C.J., dissenting).

supervisory goodwill and capital credits to satisfy regulatory capital requirements.¹²⁰ Although federal regulators do not usually permit supervisory goodwill and capital credits¹²¹ to satisfy the regulatory capital requirements,¹²² the Bank Board and the FSLIC permitted the acquiring or merged institutions to use supervisory goodwill and capital credits to satisfy their regulatory capital requirements after lengthy negotiations and as part of the inducement to acquire the failing thrifts.¹²³ The government and the three thrifts performed their contracts under the terms for many years¹²⁴ before the government decided to forbid the inclusion of these items as regulatory capital.¹²⁵

Despite the existence of the valid contract, in 1989, with the enactment of the FIRREA, the government decided to unilaterally change the terms of the contracts and disallow over 300 thrifts from including supervisory goodwill and capital credits as regulatory capital.¹²⁶ In subsequent suits brought by the three thrifts, they did not claim that Congress could not change the terms of their contracts with the government,¹²⁷ rather they sued the government for breach of those contracts.¹²⁸

The government defended its actions by relying on both the sovereign acts doctrine and the unmistakability doctrine. On these issues, the *Winstar* Court divided three ways: (1) the plurality concluded that the contracts at issue were "risk-shifting agreements,"¹²⁹ that were nothing more than promises by the government to pay any losses arising from any regulatory changes;¹³⁰ (2) the concurrence concluded that the unmistakability doctrine applied precisely to the

120. See *id.* at 2438.

121. For a description of capital credits, see *supra* note 55 and accompanying text.

122. Supervisory goodwill and capital credits cannot be used by the government to pay off creditors when a thrift becomes insolvent. See *Winstar*, 116 S. Ct. at 2444-45.

123. See *Id.* at 2445.

124. The contracts were performed by the parties from the year in which Glendale, Winstar, and Statesman entered into their agreements to acquire a thrift to 1989 when FIRREA was enacted. For example, the government performed under the terms of its contract with Glendale for eight years from 1981 to 1989.

125. See *Winstar*, 116 S. Ct. at 2446.

126. See *id.*

127. Some thrifts tried to enjoin the enforcement of FIRREA. See *Worthington*, *supra* note 1, at 131. Despite some success at the district court level, this strategy uniformly failed at the circuit court level. See *id.*

128. See *Winstar*, 116 S. Ct. at 2447.

129. See *infra* notes 139-43 and accompanying text.

130. This group consists of Justices Souter, Stevens, Breyer, and O'Connor. See *Winstar*, 116 S. Ct. at 2438.

situation, but did not relieve the government of liability;¹³¹ and (3) the dissent concluded not only that the unmistakability doctrine relieved the government of liability, but also that the plurality's opinion significantly reduced the government's defenses in contract disputes.¹³² Ultimately, the Court decided not to eliminate the unmistakability and sovereign acts doctrines, but instead merely limited the scope of the two doctrines so that neither applied to this case.

Despite concerns that the plurality's opinion "drastically reduce[d] the scope of the unmistakability doctrine, . . . and limit[ed] the sovereign acts doctrine so that it will have virtually no future application,"¹³³ the plurality's decision had limited effects on the two doctrines.¹³⁴ Instead of deciding the case under the two doctrines, the plurality merely held that they did not apply to this situation.

First, the plurality dismissed the government's sovereign acts doctrine defense, stating that the government's alteration of the regulatory capital requirements was not a "public and general act."¹³⁵ The plurality questioned whether the passage of the FIRREA was meant to advance a broader public interest.¹³⁶ The dissent, noting that capital reserves protect the FSLIC's insurance funds, suggested that the regulations were changed to protect the government in a capacity that was analogous to a private insurer.¹³⁷ In addition, the plurality stated that "allowing the [g]overnment to avoid contractual liability merely by passing any 'regulatory statute,' would flaunt the general principle that, 'when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'"¹³⁸

Next, the plurality, emphasizing that the contracts were solely risk-shifting agreements,¹³⁹ stated that the unmistakability doctrine

131. Justice Scalia argued this view, and was joined by Justices Kennedy and Thomas. *See id.* at 2476 (Scalia, J., concurring in the judgment).

132. The view was espoused by Chief Justice Rehnquist, who was joined by Justice Ginsburg. *See id.* at 2479 (Rehnquist, C.J., dissenting).

133. *Id.* (Rehnquist, C.J., dissenting).

134. The plurality disagreed with the dissent's argument that the plurality's ruling reduced the scope of the unmistakability doctrine, but instead argued that the government's position would represent a conceptual expansion of the unmistakability doctrine beyond its historical and practical warrants. *See id.* at 2459.

135. *Id.* at 2463.

136. *See id.* at 2464.

137. *See id.*

138. *Id.* at 2464-65 (quoting *Lynch v. United States*, 292 U.S. 571, 579 n.39 (1933)).

139. *See id.* at 2458.

did not apply to the contracts with the three thrifts.¹⁴⁰ The plurality held that the contracts were risk shifting agreements because the thrifts did not challenge the government's ability to change the regulatory requirements,¹⁴¹ but instead the thrifts claimed that the Bank Board and the FSLIC were contractually bound to recognize supervisory goodwill.¹⁴² As Justice Souter explained in the plurality opinion, "[s]o long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it."¹⁴³

Despite the seemingly clear rationale, the concurring and dissenting justices have criticized the plurality's opinion for going beyond precedent and also for being untenable.¹⁴⁴ Chief Justice Rehnquist, writing in dissent, responded to the plurality's "newly minted distinction" as not only contrary to the unmistakability doctrine, but also untenable.¹⁴⁵ Even Justice Scalia, who concurred in the judgment of the plurality, questioned the plurality's emphasis on risk-shifting agreements.¹⁴⁶ Justice Scalia noted that the plurality's approach had no basis in case law, and questioned whether the approach was valid under contract law.¹⁴⁷ Justice Scalia, like the Chief Justice, believed that the unmistakability doctrine applied in

140. *See id.* at 2453.

141. *See supra* notes 127-28 and accompanying text.

142. *See Winstar*, 116 S. Ct. at 2452. The thrifts simply claimed that the government assumed the risk of subsequent changes in the law and agreed to pay any damages as a result. *See id.* at 2453. The plurality noted that Congress expressed a willingness to guarantee the acquiring thrifts against loss that might occur from the supervisory mergers. *See id.* at 2459 (citing 12 U.S.C. 1729 (f) (2) (1988 ed.) (repealed 1989)). Supervisory goodwill was permitted as regulatory capital to relieve the taxpayers the burden of paying for the liquidation of the failed thrifts. Surely from the agreement in which the thrifts negotiated for goodwill to be included as regulatory capital, the thrifts did not assume the liabilities of the failed thrifts. The thrifts negotiated for the very supervisory goodwill that the government contended made the government at risk for failed thrifts. Therefore, the agreement to allow supervisory goodwill as regulatory capital only continued the government's liability for the failed thrifts, and did not shift the risk to the thrifts. The government was attempting to make the thrifts cover the liability.

143. *Id.* at 2457-58.

144. Tenable is defined as meaning capable of being defended. *See THE MERRIAM-WEBSTER DICTIONARY* 703 (1974).

145. *Winstar*, 116 S. Ct. at 2480 (Rehnquist, C.J., dissenting).

146. *See id.* at 2476 (Scalia, J., concurring in judgment). Despite concerns about the basis of the plurality's decision, Justice Scalia concurred in judgment because, in his view, the thrifts established, in unmistakable terms, that the government promised to regulate them in a particular fashion. *See id.* at 2477.

147. *See id.* at 2476 (Scalia, J., concurring in judgment).

Winstar.¹⁴⁸

Despite the criticisms, the plurality defended its position by emphasizing the need to maintain the credibility of the government as a contractor.¹⁴⁹ Specifically, the plurality focused on whether private contractors should be denied damages unless they satisfy the unmistakability doctrine.¹⁵⁰ Justice Souter stated that injecting the unmistakability doctrine “into every common contract action would . . . produce the untoward result of compromising the government’s practical capacity to make contracts.”¹⁵¹ Had the Court reached the opposite conclusion and allowed the government to release itself from its contract without liability, the credibility of the government as a contractor¹⁵² would have been undermined.¹⁵³ The result would be increased costs for the government whenever it entered into contractual agreements.¹⁵⁴ The plurality, therefore, gave limited consideration to the unmistakability doctrine.

To further support its decision not to apply the two doctrines to this situation, the plurality emphasized that its decision served the interest of fairness and equity.¹⁵⁵ The plurality noted that the federal regulators, unable to offer cash to induce the healthy thrifts to acquire the failing thrifts, resorted to supervisory goodwill as “an indispensable tool” to induce healthy thrifts to merge with sick ones.¹⁵⁶ The government’s decision to “magically” allow liabilities to

148. *See id.* at 2477 (Scalia, J., concurring in judgment).

149. *See id.* at 2459.

150. *See id.* at 2459.

151. *Id.*

152. *See* Worthington, *supra* note 1, at 119 (noting that everyday the government enters into tens of thousands of contracts with aggregate values of hundreds of millions of dollars).

153. *See Winstar*, 116 S. Ct. at 2459.

154. *See id.* at 2459 n.29 (noting that if the government were allowed to break its contracts, then the result would be higher costs as other parties would include default premiums in future government contracts).

155. *See id.* at 2442 (noting that the Bank Board encouraged healthy thrifts to take over failing thrifts). In general, the FSLIC tried to promote the acquisition of the insolvent banks. *See id.* at 2442 n.3. The FSLIC developed lists of prospective acquirers, made presentations, and held seminars to encourage the acquisition of the failing thrifts. *See id.* The efforts of the FSLIC were successful and resulted in many supervisory mergers, thereby helping the government avert paying billions in bailout funds. *See Winstar Corp. v. United States*, 994 F.2d 797, 816 (Fed. Cir. 1993) (Newman, J., dissenting), *rev’d en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff’d*, 116 S. Ct. 2432 (1996). Thus, between 1980 and 1986, over 300 mergers occurred and only 48 liquidations took place. *See Winstar*, 116 S. Ct. at 2442 n.3.

156. *Winstar*, 116 S. Ct. at 2443. However, the healthy thrifts were not forced to acquire the failing thrifts, the healthy thrifts voluntarily acquired the failing thrifts to make money. *See Winstar Corp. v. United States*, 64 F.3d 1531, 1551-52 (Fed. Cir. 1995) (en

be converted into assets was not one that it wanted to make, but was one that was necessary to keep the FSLIC solvent.¹⁵⁷ If the thrifts had been allowed to fail, the government would have liquidated the failed thrifts. The plurality noted that Congress enacted the FIRREA, which had the effect of breaching the government's contracts with the thrifts and reversing the FSLIC's decision to include supervisory goodwill as regulatory capital requirements, only when the crisis in the thrift industry continued and the FSLIC became insolvent.¹⁵⁸ Ultimately, the plurality recognized that in all fairness and justice, the government should be barred from forcing a few to bear the burden of its failed attempt to save the thrift industry, when the public as a whole should bear that burden.¹⁵⁹

In addition, general equities support the plurality's decision. The thrifts accepted great risks when they "bailed out" the government during the thrift crisis because the government had a propensity to make changes in regulatory capital requirements.¹⁶⁰ With the healthy thrifts realizing that they were unable to meet the required capital requirements at the time of merger,¹⁶¹ Justice Souter stated, "it would have been irrational [for the thrifts] to stake [their] very existence upon continuation of current policies without seeking to embody those policies in some sort of contractual commitment."¹⁶² Therefore, the plurality concluded that they "have no doubt that the [thrifts] intended to settle regulatory treatment of these transactions as a condition of their agreement[s]."¹⁶³

Because the plurality's opinion merely held that the unmistakability and sovereign acts doctrines did not apply to this situation, the decision should not expand the government's scope of liability for breach of contract beyond the thrift industry as the concurring and dissenting justices feared.¹⁶⁴ Therefore, the decision did not result in

banc) (Nies, J., dissenting), *aff'd*, 116 S. Ct. 2432 (1996).

157. See *supra* notes 28-32 and accompanying text.

158. See Worthington, *supra* note 1, at 122 (citing H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 292 (1989), reprinted in 1989 U.S.C.A.N. 86, 88-89).

159. See *id.* at 2459. The new capital requirements end up punishing the very institutions that came to the government's aid. See *Winstar Corp. v. United States*, 994 F.2d 797, 816 (Fed. Cir. 1993) (Newman, J., dissenting), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996). If the mergers had not taken place, then the public would have had the burden of liquidating the thrifts.

160. See *Winstar*, 116 S. Ct. at 2449.

161. See *id.* at 2443.

162. *Id.* at 2449.

163. *Id.*

164. See *supra* notes 133-34 and accompanying text. The *Winstar* decision exposed the government to billions of dollars in damages for breaching contracts that allowed thrifts

"sweeping changes" that cast "uncertainty" on when the government will be liable for failing to fulfill its contractual obligations,¹⁶⁵ and the government will not be liable for virtually every contract in the event of nonperformance.¹⁶⁶ Thus, when faced with an issue similar to that in *Winstar*, the government can continue to defend its actions with both the unmistakability and sovereign acts doctrines. Although the *Winstar* decision does leave uncertain the Supreme Court's position on when the government is liable for breach of contract,¹⁶⁷ the true impact of the *Winstar* decision can only be determined with future litigation.¹⁶⁸

V. CONCLUSION

Although the *Winstar* decision may increase the amount of litigation concerning the government's liability for failing to fulfill its contractual obligations,¹⁶⁹ the plurality's decision in *Winstar* correctly

to use supervisory goodwill to satisfy their regulatory capital requirements. *See Supreme Court Upsets Government Repudiation on Supervisory Goodwill*, 15 BANKING POL'Y REP. No. 14, at 2 (1996); *see also* Clancy, *supra* note 30, at 591-92.

165. *See Winstar*, 116 S. Ct. at 2479 (Rehnquist, C.J., dissenting).

166. *See id.* at 2476 (Scalia, J., concurring in judgment).

167. The decision left many questions unanswered. The most important is the question of when the unmistakability and sovereign acts doctrines apply? Additional questions are how much did the decision in fact expand the government's scope of liability? How much weight should be given to the plurality's opinion when five justices expressed disagreement with the plurality's opinion?

168. *See id.* at 2479 (Rehnquist, C.J., dissenting) (noting that the unmistakability doctrine and sovereign acts doctrine have been drastically reduced in scope and virtually eliminated, respectively).

169. A substantial amount of additional litigation may be needed to determine the appropriate amount of damages in *Winstar*. Although it appears that the government will owe restitutional damages, the courts will need to determine whether the government also needs to pay consequential damages. In its attempt to limit damages, the government already, in brief, has filed a motion to intervene in 46 of the 120 goodwill cases being heard by the U.S. Court of Federal Claims. R. Christian Bruce, *FDIC Tries To Take Over As Plaintiff In Forty-Six Supervisory Goodwill Suits*, 67 BANKING REP. (BNA) No. 16, at 714-15 (Oct. 28, 1996). The motion to intervene was a major threat to investors and shareholders who stood to gain from the *Winstar* decision, because if the government is successful in naming itself as the plaintiff, the government will have little incentive to sue itself, and the current plaintiffs will be "left out in the cold." *Id.* The government sought to intervene, because when the thrifts failed, the government was put into receivership. Since the government became the receiver, the government argues that it "owns all of these [goodwill] claims as receiver for the failed thrifts." *Id.*

In addition, the government also attempts to limit its damages by posing a defense grounded on the statute of limitations. *See Banking and Finance*, 65 L. WK., Jan. 21, 1997, at 2459. The government contended that at least 26 thrifts filed their claims more than six years after FIRREA was enacted on August 9, 1989. *See id.* Therefore, the government argued that the thrifts' claims should be barred by the statute of limitations. *See id.* The thrifts, however, contended that the statute of limitations did not begin until at least De-

provided a way for the government to shoulder the costs of breaching their contracts with the thrifts. The *Winstar* holding was inevitable because the Bank Board had induced healthy thrifts to merge with failed thrifts in an effort to maintain the solvency of the FSLIC.¹⁷⁰ The court recognized that it would be fundamentally unfair¹⁷¹ for the government not to be liable for breach of contract when the thrifts were induced to come to the aid of the government. The government's decision to breach its contracts and not to allow the thrifts to count supervisory goodwill and capital credits toward regulatory capital requirements was not made because of any changes in the circumstances, but was made once the government realized that the plan to save thrifts from further failure was unsuccessful.¹⁷² The decision to reverse its position was made because the government felt that including goodwill "circumvented the whole purpose of the reserve requirements."¹⁷³ However, the government should have been aware that supervisory goodwill circumvented the reserve requirements when it expressly agreed to the terms of the contracts in question.

The plurality maintained the credibility of the government by concluding that it was indeed liable for breach of contract in this instance. By basing its decision on other factors, such as the Bank Board's inducing the thrifts into the mergers, the plurality was not

ember 7, 1989, when the OTS's regulations implementing FIRREA became effective. *See id.* Twenty-four of the 26 thrifts filed their claims prior to December 7, 1995. *See id.*

For the government to succeed on its claims, the government needed to show that despite the delayed timing of the OTS' regulations, FIRREA's enactment constituted an actual, not anticipatory breach of the contracts with the thrifts. *See id.* An anticipatory repudiation "occurs when an obligor communicates to an obligee that the obligor will commit a breach in the future." *Id.* The government argued that an actual breach occurred because OTS was forbidden to allow supervisory goodwill. *See id.* The federal claims court, however, held that the claims of the 24 thrifts did not begin until at least the OTS regulation became effective. *See id.* Therefore, the 24 thrifts were permitted to proceed with their claims. *See id.* The court's ruling, however, did not dispose of the government's statute of limitations claims for the two remaining thrifts. *See id.* For the two thrifts to overcome the government's defense, the two thrifts needed to show that their claims did not ripen until the OTS' regulations were actually applied to them. *See id.*

170. *See supra* notes 28-32 and accompanying text.

171. The FIRREA regulations punish the very institutions that came to the aid of the government, these institutions not only have a case based in law, but also in equity and in fundamental fairness. *See Winstar Corp. v. United States*, 994 F.2d 797, 816 (Fed. Cir. 1993) (Newman, J., dissenting), *rev'd en banc*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S. Ct. 2432 (1996).

172. *See supra* notes 57-59 and accompanying text.

173. *Winstar*, 116 S. Ct. at 2445. The whole purpose of regulatory capital requirements is to protect depositors. *See id.* Goodwill is not cash, and when a thrift fails, goodwill cannot be used to cover any shortfall. *See id.*

only able to maintain the government's credibility, but appears also to have limited its holding to the particular facts related to the three thrifts. Since the situations of the three thrifts in *Winstar* cover "much of the gamut of factual situations" that will be present in subsequent suits by the other thrifts that were also induced by the government to acquire failing thrifts,¹⁷⁴ the *Winstar* case provides strong precedent for the other thrifts. However, since the plurality was able to reach its decision without altering either the unmistakability or sovereign acts doctrines,¹⁷⁵ it is unclear whether the government's scope of liability beyond these thrifts is affected by the *Winstar* decision. Although the plurality's opinion may lead to additional litigation to clarify the law related to government liability for breaches of contracts, the increase in litigation is a small price to pay for a fair decision.

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174. See Worthington, *supra* note 1, at 139. There were 89 FIRREA related cases on the docket of the Court of Federal Claims as of September 1995. See *Financial Institutions Reform*, *supra* note 87, at 1162. In addition, there is the potential for many more cases as over 300 thrifts had supervisory goodwill listed among its assets at the end of 1990. See Worthington, *supra* note 1 at 140 (citing James M. Marks, *The Goodwill "Jackpot: Will Thrifts Collect? Part II* 1 (1995)). The *Winstar* decision is "especially important as precedent because the three consolidated cases . . . covered much of the gamut of factual situations that [are] present in [the other] cases." Worthington, *supra* note 1, at 140. The government faces a \$1.4 billion judgment against Glendale alone, and informed estimates place the total liability of all similar cases at around \$20 billion. See *id.* at 140 n.128 (citing Robert A. Preskill, *Glendale Bank Wins Suit against Government over FIRREA, Corp.*, LEGAL TIMES, 1995, at 22).

175. See *Winstar*, 116 S. Ct. at 2459 (rejecting the government's position that would result in a conceptual expansion of the unmistakability doctrine).